

CHAPTER 26.1-03.1 RISK-BASED CAPITAL REPORTS

26.1-03.1-01. Definitions. As used in this chapter:

1. "Adjusted risk-based capital report" means a risk-based capital report that has been adjusted by the commissioner in accordance with subsection 3 of section 26.1-03.1-02.
2. "Corrective order" means an order issued by the commissioner specifying corrective actions that the commissioner has determined are required.
3. "Domestic insurer" means any insurance company domiciled in this state, except a county mutual insurance company.
4. "Foreign insurer" means any insurance company that is licensed to do business in this state under chapter 26.1-11 but is not domiciled in this state.
5. "Life or health insurer" means any licensed life or health insurance company or a licensed property and casualty insurer writing only accident and health insurance.
6. "Negative trend" means, with respect to a life or health insurer, negative trend over a period of time, as determined in accordance with the trend test calculation included in the risk-based capital instructions.
7. "Risk-based capital instructions" means the risk-based report, including risk-based capital instructions adopted by the national association of insurance commissioners, as such risk-based capital instructions may be amended by the national association of insurance commissioners from time to time in accordance with the procedures adopted by the national association of insurance commissioners.
8. "Risk-based capital level" means an insurer's company action level risk-based capital, regulatory action level risk-based capital, authorized control level risk-based capital, or mandatory control level risk-based capital and:
 - a. "Authorized control level risk-based capital" means the number determined under the risk-based capital formula in accordance with the risk-based capital instructions.
 - b. "Company action level risk-based capital" means, with respect to any insurer, the product of two and its authorized control level risk-based capital.
 - c. "Mandatory control level risk-based capital" means the product of seventy hundredths and the authorized control level risk-based capital.
 - d. "Regulatory action level risk-based capital" means the product of one and one-half and its authorized control level risk-based capital.
9. "Risk-based capital plan" means a comprehensive financial plan containing the elements specified in subsection 2 of section 26.1-03.1-03. If the commissioner rejects the risk-based capital plan, and it is revised by the insurer, with or without the commissioner's recommendation, the plan must be called the "revised risk-based capital plan".
10. "Risk-based capital report" means the report required in section 26.1-03.1-02.
11. "Total adjusted capital" means the sum of:

- a. An insurer's statutory capital and surplus as determined in accordance with statutory accounting applicable to the annual statements required to be filed under section 26.1-03-07; and
- b. Such other items, if any, as the risk-based capital instructions may provide.

26.1-03.1-02. Risk-based capital reports.

1. On or prior to each March first, every domestic insurer shall prepare and submit to the commissioner a report of its risk-based capital levels as of the end of the calendar year just ended, in a form and containing any information required by the risk-based capital instructions. In addition, every domestic insurer shall file its risk-based capital report:
 - a. With the national association of insurance commissioners in accordance with the risk-based capital instructions; and
 - b. With the insurance commissioner in any state in which the insurer is authorized to do business, if the insurance commissioner has notified the insurer of its request in writing, in which case the insurer shall file its risk-based capital report not later than the later of:
 - (1) Fifteen days from the receipt of notice to file its risk-based capital report with that state; or
 - (2) The filing date.
2. A life and health insurer's risk-based capital must be determined in accordance with the formula set forth in the risk-based capital instructions. The formula must take into account, and may adjust for the covariance between:
 - a. The risk with respect to the insurer's assets;
 - b. The risk of adverse insurance experience with respect to the insurer's liabilities and obligations;
 - c. The interest rate risk with respect to the insurer's business; and
 - d. All other business risks and any other relevant risks as are set forth in the risk-based capital instructions;determined in each case by applying the factors in the manner set forth in the risk-based capital instructions.
3. A property and casualty insurer's risk-based capital must be determined in accordance with the formula set forth in the risk-based capital instructions. The formula must take into account, and may adjust for the covariance between:
 - a. Asset risk;
 - b. Credit risk;
 - c. Underwriting risk; and
 - d. All other business risks and any other relevant risks as are set forth in the risk-based instructions;determined in each case by applying the factors in the manner set forth in the risk-based capital instructions.

4. An excess of capital over the amount produced by the risk-based capital requirements contained in this chapter and the formulas, schedules, and instructions referenced in this chapter is desirable in the business of insurance. Accordingly, insurers should seek to maintain capital above the risk-based capital levels required by this chapter. Additional capital is used and is useful in the insurance business and helps to secure an insurer against various risks inherent in, or affecting, the business of insurance and not accounted for or only partially measured by the risk-based capital requirements contained in this chapter.
5. If a domestic insurer files a risk-based capital report that in the judgment of the commissioner is inaccurate, then the commissioner shall adjust the risk-based capital report to correct the inaccuracy and notify the insurer of the adjustment. The notice must contain a statement of the reason for the adjustment. A risk-based capital report so adjusted is referred to as an adjusted risk-based capital report.

26.1-03.1-03. Company action level event.

1. "Company action level event" means any of the following events:
 - a. The filing of a risk-based capital report by an insurer which indicates that:
 - (1) The insurer's total adjusted capital is greater than or equal to its regulatory action level risk-based capital but less than its company action level risk-based capital; or
 - (2) If a life or health insurer, the insurer has total adjusted capital that is greater than or equal to its company action level risk-based capital but less than the product of its authorized control level risk-based capital and two and one-half and has a negative trend;
 - b. The notification by the commissioner to the insurer of an adjusted risk-based capital report that indicates an event in subdivision a, provided the insurer does not challenge the adjusted risk-based capital report under section 26.1-03.1-07; or
 - c. If, under section 26.1-03.1-07, an insurer challenges an adjusted risk-based capital report that indicates the event in subdivision a, the notification by the commissioner to the insurer that the commissioner, after a hearing, has rejected the insurer's challenge.
2. In the event of a company action level event, the insurer shall prepare and submit to the commissioner a risk-based capital plan that must:
 - a. Identify the conditions that contribute to the company action level event;
 - b. Contain proposals of corrective actions that the insurer intends to take and would be expected to result in the elimination of the company action level event;
 - c. Provide projections of the insurer's financial results in the current year and at least the four succeeding years, both in the absence of proposed corrective actions and giving effect to the proposed corrective actions, including projections of statutory operating income, net income, capital, or surplus. The projections for both new and renewal business may include separate projections for each major line of business and separately identify each significant income, expense, and benefit component;
 - d. Identify the key assumptions impacting the insurer's projections and the sensitivity of the projections to the assumptions; and

- e. Identify the quality of, and problems associated with, the insurer's business, including its assets, anticipated business growth and associated surplus strain, extraordinary exposure to risk, mix of business, and use of reinsurance, if any, in each case.
3. The risk-based capital plan must be submitted:
 - a. Within forty-five days of the company action level event; or
 - b. If the insurer challenges an adjusted risk-based capital report under section 26.1-03.1-07, within forty-five days after notification to the insurer that, after a hearing, the commissioner has rejected the insurer's challenge.
4. Within sixty days after the submission by an insurer of a risk-based capital plan to the commissioner, the commissioner shall notify the insurer whether the risk-based capital plan may be implemented or is, in the judgment of the commissioner, unsatisfactory. If the commissioner determines the risk-based capital plan is unsatisfactory, the notification to the insurer must set forth the reasons for the determination, and may set forth proposed revisions that will render the risk-based capital plan satisfactory, in the judgment of the commissioner. Upon notification from the commissioner, the insurer shall prepare a revised risk-based capital plan, which may incorporate by reference any revisions proposed by the commissioner, and shall submit the revised risk-based capital plan to the commissioner:
 - a. Within forty-five days after the notification from the commissioner; or
 - b. If the insurer challenges the notification from the commissioner under section 26.1-03.1-07, within forty-five days after a notification to the insurer that, after a hearing, the commissioner has rejected the insurer's challenge.
5. In the event of a notification by the commissioner to an insurer that the insurer's risk-based capital plan or revised risk-based capital plan is unsatisfactory, subject to the insurer's right to a hearing under section 26.1-03.1-07, the commissioner may specify in the notification that the notification constitutes a regulatory action level event.
6. Every domestic insurer that files a risk-based capital plan or revised risk-based capital plan with the commissioner shall file a copy of the risk-based capital plan or revised risk-based capital plan with the insurance commissioner in any state in which the insurer is authorized to do business if:
 - a. The state has a risk-based capital provision substantially similar to subsection 1 of section 26.1-03.1-08; and
 - b. The insurance commissioner of that state has notified the insurer of its request for the filing in writing, in which case the insurer shall file a copy of the risk-based capital plan or revised risk-based capital plan in that state no later than the later of:
 - (1) Fifteen days after the receipt of notice to file a copy of its risk-based capital plan or revised risk-based capital plan with the state; or
 - (2) The date on which the risk-based capital plan or revised risk-based capital plan is filed under subsections 3 and 4.

26.1-03.1-04. Regulatory action level event.

1. "Regulatory action level event" means, with respect to any insurer, any of the following events:

- a. The filing of a risk-based capital report by the insurer that indicates that the insurer's total adjusted capital is greater than or equal to its authorized control level risk-based capital but less than its regulatory action level risk-based capital;
 - b. The notification by the commissioner to an insurer of an adjusted risk-based capital report that indicates the event in subdivision a, provided the insurer does not challenge the adjusted risk-based capital report under section 26.1-03.1-07;
 - c. If, under section 26.1-03.1-07, the insurer challenges an adjusted risk-based capital report that indicates the event in subdivision a, the notification by the commissioner to the insurer that the commissioner, after a hearing, has rejected the insurer's challenge;
 - d. The failure of the insurer to file a risk-based capital report by the filing date, unless the insurer has provided an explanation for the failure that is satisfactory to the commissioner and has cured the failure within ten days after the filing date;
 - e. The failure of the insurer to submit a risk-based capital plan to the commissioner within the time period set forth in subsection 3 of section 26.1-03.1-03;
 - f. Notification by the commissioner to the insurer that:
 - (1) The risk-based capital plan or revised risk-based capital plan submitted by the insurer, in the judgment of the commissioner, is unsatisfactory; and
 - (2) The notification constitutes a regulatory action level event with respect to the insurer, provided the insurer has not challenged the determination under section 26.1-03.1-07;
 - g. If, under section 26.1-03.1-07, the insurer challenges a determination by the commissioner under subdivision f, the notification by the commissioner to the insurer that, after a hearing, the commissioner has rejected the challenge;
 - h. Notification by the commissioner to the insurer that the insurer has failed to adhere to its risk-based capital plan or revised risk-based capital plan, but only if the failure has a substantial adverse effect on the ability of the insurer to eliminate the company action level event in accordance with its risk-based capital plan or revised risk-based capital plan and the commissioner has so stated in the notification, provided the insurer has not challenged the determination under section 26.1-03.1-07; or
 - i. If, under section 26.1-03.1-07, the insurer challenges a determination by the commissioner under subdivision h, the notification by the commissioner to the insurer that, after a hearing, the commissioner has rejected the challenge.
2. In the event of a regulatory action level event the commissioner shall:
- a. Require the insurer to prepare and submit a risk-based capital plan or, if applicable, a revised risk-based capital plan;
 - b. Perform such examination or analysis of the assets, liabilities, and operations of the insurer, including a review of its risk-based capital plan or revised risk-based capital plan, as the commissioner deems necessary; and

- c. Subsequent to the examination or analysis, issue an order specifying the corrective actions as the commissioner determines are required in a corrective order.
- 3. In determining corrective actions, the commissioner may take into account any factors deemed relevant with respect to the insurer based upon the commissioner's examination or analysis of the assets, liabilities, and operations of the insurer, including the results of any sensitivity tests undertaken pursuant to the risk-based capital instructions. The risk-based capital plan or revised risk-based capital plan must be submitted:
 - a. Within forty-five days after the occurrence of the regulatory action level event;
 - b. If the insurer challenges an adjusted risk-based capital report under section 26.1-03.1-07 and the challenge is not judged to be frivolous by the commissioner, within forty-five days after the notification to the insurer that, after a hearing, the commissioner has rejected the insurer's challenge; or
 - c. If the insurer challenges a revised risk-based capital plan under section 26.1-03.1-07 and the challenge is not judged to be frivolous by the commissioner, within forty-five days after the notification to the insurer that, after a hearing, the commissioner has rejected the insurer's challenge.
- 4. The commissioner may retain actuaries and investment experts and other consultants as the commissioner judges to be necessary to review the insurer's risk-based capital plan or revised risk-based capital plan, examine or analyze the assets, liabilities, and operations of the insurer and formulate the corrective order with respect to the insurer. The fees, costs, and expenses relating to consultants must be borne by the affected insurer or such other party as directed by the commissioner.

26.1-03.1-05. Authorized control level event.

- 1. "Authorized control level event" means any of the following events:
 - a. The filing of a risk-based capital report by the insurer that indicates that the insurer's total adjusted capital is greater than or equal to its mandatory control level risk-based capital but less than its authorized control level risk-based capital;
 - b. The notification by the commissioner to the insurer of an adjusted risk-based capital report that indicates the event in subdivision a, provided the insurer does not challenge the adjusted risk-based capital report under section 26.1-03.1-07;
 - c. If, under section 26.1-03.1-07, the insurer challenges an adjusted risk-based capital report that indicates the event in subdivision a, notification by the commissioner to the insurer that, after a hearing, the commissioner has rejected the insurer's challenge;
 - d. The failure of the insurer to respond, in a manner satisfactory to the commissioner, to a corrective order provided the insurer has not challenged the corrective order under section 26.1-03.1-07; or
 - e. If the insurer has challenged a corrective order under section 26.1-03.1-07 and, after a hearing, the commissioner has rejected the challenge or modified the corrective order, the failure of the insurer to respond, in a manner satisfactory to the commissioner, to the corrective order subsequent to rejection or modification by the commissioner.

2. In the event of an authorized control level event with respect to an insurer, the commissioner shall:
 - a. Take such actions as are required under section 26.1-03.1-04 regarding an insurer with respect to which a regulatory action level event has occurred; or
 - b. Take necessary action to cause the insurer to be placed under regulatory control under chapter 26.1-06.1 if the commissioner deems it to be in the best interests of the policyholders, creditors of the insurer, and the public. If the commissioner takes such actions, the authorized control level event must be deemed sufficient grounds for the commissioner to take action under chapter 26.1-06.1, and the commissioner has the rights, powers, and duties with respect to the insurer in chapter 26.1-06.1. If the commissioner takes action under this subdivision pursuant to an adjusted risk-based capital report, the insurer is entitled to any protection afforded to insurers under chapter 26.1-06.1 pertaining to summary proceedings.

26.1-03.1-06. Mandatory control level event.

1. "Mandatory control level event" means any of the following events:
 - a. The filing of a risk-based capital report that indicates that the insurer's total adjusted capital is less than its mandatory control level risk-based capital;
 - b. Notification by the commissioner to the insurer of an adjusted risk-based capital report that indicates the event in subdivision a, provided the insurer does not challenge the adjusted risk-based capital report under section 26.1-03.1-07; or
 - c. If, under section 26.1-03.1-07, the insurer challenges an adjusted risk-based capital report that indicates the event in subdivision a, notification by the commissioner to the insurer that, after a hearing, the commissioner has rejected the insurer's challenge.
2. In the event of a mandatory control level event:
 - a. With respect to a life insurer, the commissioner shall take actions as are necessary to place the insurer under regulatory control under chapter 26.1-06.1. In that event, the mandatory control level event must be deemed sufficient grounds for the commissioner to take action under chapter 26.1-06.1, and the commissioner has the rights, powers, and duties in chapter 26.1-06.1 with respect to the insurer. If the commissioner takes action pursuant to an adjusted risk-based capital report, the insurer is entitled to the protection of chapter 26.1-06.1 pertaining to summary proceedings. Notwithstanding any of the foregoing, the commissioner may forego action for up to ninety days after the mandatory control level event if the commissioner finds there is a reasonable expectation that the mandatory control level event may be eliminated within the ninety-day period.
 - b. With respect to a property and casualty insurer, the commissioner may take such actions as are necessary to place the insurer under regulatory control under chapter 26.1-06.1, or, in the case of an insurer that is not writing business and that is running off its existing business, may allow the insurer to continue its runoff under the supervision of the commissioner. In either event, the mandatory control level event must be deemed sufficient grounds for the commissioner to take action under chapter 26.1-06.1 and the commissioner has the rights, powers, and duties in chapter 26.1-06.1 with respect to the insurer. If the commissioner takes action pursuant to an adjusted risk-based capital report, the insurer is entitled to the protection of chapter 26.1-06.1 pertaining to summary proceedings. Notwithstanding any of the foregoing, the

commissioner may forego action for up to ninety days after the mandatory control level event if the commissioner finds there is a reasonable expectation that the mandatory control level events may be eliminated within the ninety-day period.

26.1-03.1-07. Hearings. Upon:

1. Notification to an insurer by the commissioner of an adjusted risk-based capital report;
2. Notification to an insurer by the commissioner that:
 - a. The insurer's risk-based capital plan or revised risk-based capital plan is unsatisfactory; and
 - b. Such notification constitutes a regulatory action level event with respect to the insurer;
3. Notification to any insurer by the commissioner that the insurer has failed to adhere to its risk-based capital plan or revised risk-based capital plan and that the failure has a substantial adverse effect on the ability of the insurer to eliminate the company action level event with respect to the insurer in accordance with its risk-based capital plan or revised risk-based capital plan; or
4. Notification to an insurer by the commissioner of a corrective order with respect to the insurer;

the insurer is entitled to a confidential departmental hearing, on a record, at which the insurer may challenge any determination or action by the commissioner. The insurer shall notify the commissioner of its request for a hearing within five days after the notification by the commissioner under subsection 1, 2, 3, or 4. Upon receipt of the insurer's request for a hearing, the commissioner must set a date for the hearing, which date must be no less than ten nor more than thirty days after the date of the insurer's request.

26.1-03.1-08. Confidentiality - Prohibition on announcements - Prohibition on use in ratemaking.

1. All risk-based capital reports, to the extent the information therein is not required to be set forth in a publicly available annual statement schedule, and risk-based capital plans, including the results or report of any examination or analysis of an insurer performed under this chapter and any corrective order issued by the commissioner pursuant to examination or analysis, with respect to any domestic insurer or foreign insurer that are filed with the commissioner constitute information that might be damaging to the insurer if made available to its competitors, and therefore must be kept confidential by the commissioner. This information may not be made public or be subject to subpoena, other than by the commissioner and then only for the purpose of enforcement actions taken by the commissioner under this chapter or any other provision of the insurance laws of this state.
2. It is the judgment of the legislative assembly that the comparison of an insurer's total adjusted capital to any of its risk-based capital levels is a regulatory tool that may indicate the need for possible corrective action with respect to the insurer, and is not intended as a means to rank insurers generally. Therefore, except as otherwise required under this chapter, the making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in a newspaper, magazine, or other publication, or in the form of a notice, circular, pamphlet, letter, or poster, or over any radio or television station, or in any other way, an advertisement, announcement, or statement containing an assertion, representation, or statement

with regard to the risk-based capital levels of any insurer, or of any component derived in the calculation, by any insurer, insurance producer, or other person engaged in any manner in the insurance business would be misleading and is prohibited. However, if any materially false statement with respect to the comparison regarding an insurer's total adjusted capital to its risk-based capital levels, or any of them, or an inappropriate comparison of any other amount to the insurer's risk-based capital levels is published in any written publication and the insurer is able to demonstrate to the commissioner with substantial proof the falsity of the statement, or the inappropriateness, as the case may be, then the insurer may publish an announcement in a written publication if the sole purpose of the announcement is to rebut the materially false statement.

3. It is the further judgment of the legislative assembly that the risk-based capital instructions, risk-based capital reports, adjusted risk-based capital reports, risk-based capital plans, and revised risk-based capital plans are intended solely for use by the commissioner in monitoring the solvency of insurers and the need for possible corrective action with respect to insurers and may not be used by the commissioner for ratemaking nor considered or introduced as evidence in any rate proceeding nor used by the commissioner to calculate or derive any elements of an appropriate premium level or rate of return for any line of insurance that an insurer or any affiliate is authorized to write.

26.1-03.1-09. Supplemental provisions - Rules - Exemption.

1. This chapter is supplemental to any other laws of this state, and does not preclude or limit any other powers or duties of the commissioner under these laws, including chapters 26.1-06.1 and 26.1-06.2.
2. The commissioner may adopt rules necessary for the implementation of this chapter.
3. The commissioner may exempt from the application of this chapter any domestic property and casualty insurer that:
 - a. Writes direct business only in this state;
 - b. Writes direct annual premiums less than an amount determined by the commissioner; and
 - c. Assumes no reinsurance in excess of five percent of direct premium written.

26.1-03.1-10. Foreign insurers.

1. Upon the written request of the commissioner, any foreign insurer shall submit to the commissioner a risk-based capital report as of the end of the calendar year just ended, the later of:
 - a. The date a risk-based capital report would be required to be filed by a domestic insurer under this chapter; or
 - b. Fifteen days after the request is received by the foreign insurer.

At the written request of the commissioner, any foreign insurer shall promptly submit to the commissioner a copy of any risk-based capital plan that is filed with the insurance commissioner of another state.

2. In the event of a company action level event, regulatory action level event, or authorized control level event, with respect to any foreign insurer as determined under the risk-based capital statute applicable in the state of domicile of the insurer,

or, if no risk-based capital provision is in force in that state, under the provisions of this chapter, if the insurance commissioner of the state of domicile of the foreign insurer fails to require the foreign insurer to file a risk-based capital plan in the manner specified under that state's risk-based capital statute, or, if no risk-based capital provision is in force in the state, the commissioner may require the foreign insurer to file a risk-based capital plan with the commissioner under section 26.1-03.1-03. In such event, the failure of the foreign insurer to file a risk-based capital plan with the commissioner is grounds to order the insurer to cease and desist from writing new insurance business in this state.

3. In the event of a mandatory control level event with respect to any foreign insurer, if no domiciliary receiver has been appointed with respect to the foreign insurer under the rehabilitation and liquidation statute applicable in the state of domicile of the foreign insurer, the commissioner may make application to the district court permitted under section 26.1-06.1-04 with respect to the liquidation of property of foreign insurers found in this state, and the occurrence of the mandatory control level event is adequate grounds for the application.

26.1-03.1-11. Immunity. There is no liability on the part of, and no cause of action may arise against, the commissioner or the insurance department or its employees or agents for any action taken by them in the performance of their powers and duties under this chapter.

26.1-03.1-12. Notices. All notices by the commissioner to an insurer that may result in regulatory action hereunder are effective upon dispatch if transmitted by registered mail, or in the case of any other transmission is effective upon the insurer's receipt of the notice.

26.1-03.1-13. Phasein provision.

1. For risk-based capital reports required to be filed by life insurers with respect to 1993, the following requirements apply in lieu of the provisions of sections 26.1-03.1-03, 26.1-03.1-04, 26.1-03.1-05, and 26.1-03.1-06:
 - a. In the event of a company action level event with respect to a domestic insurer, the commissioner may take no regulatory action hereunder.
 - b. In the event of a regulatory action level event under subdivision a, b, or c of subsection 1 of section 26.1-03.1-04, the commissioner shall take the actions required under section 26.1-03.1-03.
 - c. In the event of a regulatory action level event under subdivision d, e, f, g, h, or i of subsection 1 of section 26.1-03.1-04 or an authorized control level event, the commissioner shall take the actions required under section 26.1-03.1-04 with respect to the insurer.
 - d. In the event of a mandatory control level event with respect to an insurer, the commissioner shall take the actions required under section 26.1-03.1-05 with respect to the insurer.
2. For risk-based capital reports required to be filed by property and casualty insurers with respect to 1994, the following requirements apply in lieu of the provisions of sections 26.1-03.1-03, 26.1-03.1-04, 26.1-03.1-05, and 26.1-03.1-06:
 - a. In the event of a company action level event with respect to a domestic insurer, the commissioner shall take no regulatory action hereunder.
 - b. In the event of a regulatory action level event under subdivision a, b, or c of subsection 1 of section 26.1-03.1-04, the commissioner shall take the actions required under section 26.1-03.1-03.

- c. In the event of a regulatory action level event under subdivision d, e, f, g, h, or i of subsection 1 of section 26.1-03.1-04 or an authorized control level event, the commissioner shall take the action required under section 26.1-03.1-05 with respect to the insurer.